In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-861

RICHARD LLOYD HARWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that in accepting his guilty plea the trial judge failed to address him personally as required by Rule 11 of the Federal Rules of Criminal Procedure and that he was denied due process because he was not shown the presentence reports.

On December 27, 1972, a thirty-six count indictment was returned charging petitioner—the president of the Peoples State Bank of East Tawas, Michigan—with making false entries in bank records (18 U.S.C. 1005) and with misapplying and embezzling bank funds (18 U.S.C. 656). On February 5, 1973, petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to three counts of making false entries in bank records. The remaining counts of the indictment were subsequently dismissed. He was sentenced to five years' imprisonment on each of the three counts, with the sentences to run concurrently.

On October 29, 1973, petitioner filed separate motions under Rule 32, Fed. R. Crim. P., and 28 U.S.C. 2255 seeking to withdraw his plea of guilty . Evidentiary hearings were held on November 16 and November 28, 1973, at the conclusion of which the district court denied both motions (Pet. App. A). The court of appeals affirmed (Pet. App. B).

At the time petitioner tendered his guilty plea, the district court judge addressed him in part as follows (Pet. App. A, pp. 12-13):

> THE COURT: And is there anything about it that you don't understand in the proceeding?
>
> DEFENDANT HARWOOD: No, sir.
>
> THE COURT: I see, and have you been furnished at one time with a copy of the Indictment?
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> DEFENDANT HARWOOD: Yes, your Honor, I have.
>
> THE COURT: And are you familiar with the charges that are contained in Counts 1, 3 and 5?
>
> DEFENDANT HARWOOD: Yes, sir, I am.
>
> THE COURT: And how do you plead as to Count 1?
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> DEFENDANT HARWOOD: Guilty, sir.
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> THE COURT: And how do you plead as to Count 3?
>
> DEFENDANT HARWOOD: Guilty.
>
> THE COURT: And how do you plead as to Count 5?
>
> DEFENDANT HARWOOD: Guilty.

THE COURT: And in relation to each one of those pleas of Guilty, you know what you are charged with in the counts, is that correct?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And you have discussed the matter with your attorney?

DEFENDANT HARWOOD: Yes, sir, your Honor, I have.

THE COURT: And are you pleading Guilty to Counts 1, 3, and 5 because you are guilty of the charges contained in those three counts?

DEFENDANT HARWOOD: Yes, your Honor, I am.

The district judge also determined that petitioner was aware of the consequences of his plea (Pet. App. A, pp. 11, 13):

THE COURT: All right, Mr. Woods.

MR WOODS: I have discussed this matter in depth and at length on several occasions with Mr. Harwood, your Honor. He has been advised that he could be tried either by the Court or Jury in this matter. He knows that each one of the three counts carries a maximum of $5,000 fine and/or five years imprisonment.

* * * * *

THE COURT: And you offer that plea realizing the full consequence of your plea, you may be required to serve a term of imprisonment of five years on each one of the three counts or any part of five years?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And/or pay a fine of $5,000 or any part of $5,000 as to each one of those three counts?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And knowing of those consequences, do you still plead Guilty?

DEFENDANT HARWOOD: Yes, sir, I do.

The judge ascertained further that petitioner's decision to plead guilty had been made voluntarily (*id.* at 13):

THE COURT: In talking about your plea of Guilty to all three counts, has anyone promised you anything in return for your plea of Guilty to those counts?

DEFENDANT HARWOOD: No, your Honor.

THE COURT: And has anyone threatened you in any way to have you plead Guilty to any one of those three counts or all three counts?

DEFENDANT HARWOOD: No, sir.

Finally, before imposing sentence the district judge stated that he had had the benefit of two probation reports, which had been prepared in accordance with Rule 32(c), Fed. R. Crim. P., and he gave petitioner every opportunity to present any information that might have affected his plea or should have been considered in amelioration of his sentence (*id.* at 15, 18).

1. Petitioner contends that the district judge failed to address him personally, as required by Rule 11 of the Federal Rules of Criminal Procedure, in order to determine whether his decision to plead guilty had been made voluntarily and with complete understanding of the nature of the charges to which he was pleading. At no

point in his petition does petitioner suggest that he did not plead guilty voluntarily or that he misunderstood the charges to which his plea related, apparently being content with the assertion that "where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting" (Pet. 6).

The exchanges quoted above conclusively establish that the district judge did comply with the requirements of Rule 11 in the present case. Before accepting the guilty plea tendered by petitioner, the judge undertook to determine whether petitioner had discussed with his retained attorney the alternatives available to him, whether he understood the significance of his actions, the charge that had been made against him, the possible consequences of his proposed plea, and finally, whether he had decided to plead guilty because of threats or promises or because he was in fact guilty as charged. Only after he had satisfied himself with respect to these matters did the judge accept petitioner's plea.[1]

There is no substantial dispute here regarding the applicable legal standards governing this issue. The question is simply whether the particular inquiry undertaken by the district court in this case was sufficient. There is no occasion for this Court to review the conclusion of the two courts below that the inquiry in this particular case was adequate.

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[1]The present case is therefore unlike *McCarthy* v. *United States*, 394 U.S. 459. In that case, the district judge had not asked the petitioner any questions calculated to determine whether he understood the nature of the charges that had been made against him.

2. Petitioner also contends that the district judge erred in not questioning him personally at the time he indicated that he wished to plead guilty to determine whether such a plea had a basis in fact. As noted by the court of appeals, however, Rule 11 does not require that a court explore with the defendant the factual basis of a plea at the time the plea is received. Rather, the rule imposes upon the court an obligation to satisfy itself before the entry of judgment that the plea has a factual basis. The Advisory Committee has suggested that this obligation may be met in any of three ways: (1) inquiring of the defendant; (2) inquiring of the prosecutor; or (3) examining the presentence report. Rule 11, Fed. R. Crim.P., 1966 Notes of Advisory Committee.

In the present case, the district court had examined two presentence reports prior to imposing sentence. The court of appeals made an independent examination of those reports *in camera* and concluded that they contained a sufficient factual basis for petitioner's plea (Pet. App. B, p. 20). Use of the presentence report for this purpose fully comports with Rule 11. See, *e.g.*, *Davis* v. *United States*, 470 F.2d 1128, 1129 n. 2 (C.A. 3).

3. Finally, petitioner contends that he was denied due process because he was not shown the pre-sentence reports. Petitioner does not suggest that he or his attorney asked to see a copy of the reports prior to imposition of sentence, however, or that he has any reason to believe that anything contained in the reports was incorrect. The confidentiality of presentence reports is currently recognized by Rule 32(c)(2), Fed. R. Crim. P., and has been approved by this Court. *Gregg* v. *United States*, 394 U.S. 489, 492; see also *United States* v. *Dockery*, 447 F.2d 1178, 1183 (C.A.D.C.), certiorari denied, 404 U.S.

950, and cases cited therein. In any event, the issue does not warrant review by this Court, since, under the recent amendments to the Federal Rules of Criminal Procedure (62 F.R.D. 271, *et seq.*), scheduled to take effect on August 1, 1975, Rule 32 has been changed to provide generally for the disclosure of such reports.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[2]The new Rule 32(c)(3)(A) provides (62 F.R.D. at 320-321):

> (A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.